89-39 (2)

Supreme Court, U.S.
FILED
JUL 9 1989
JOSEPH F. SPANIOL, JR.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SPRING TERM 1989

GEORGE N. MEROS

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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George N. Meros, Pro Se
#09857-016
PMB 1000
FCI - Tallahassee
Tallahassee, FL 32301

131 pp

UNITED STATES of America,
Plaintiff-Appellee,
v.
George N. MEROS, John Frazier, a/k/a J.J., Michael Ferrentino, Linda Deemer Ferrentino, Michael Rubenstein, Achilles Nick Vaseliades, Bernard H. Johnson, Robert English, Albert H. Papolos, Stephen P. Papolos, Robert J. Papolos,
Defendants-Appellants.

No. 85-3774.
United States Court of Appeals,
Eleventh Circuit.

Feb. 13, 1989.

Defendants were convicted in the United States District Court, Middle District of Florida, No. 84-76-Cr-T-8, Ben Krentzman, J., of various racketeering, narcotics, and money laundering offenses, and they appealed. The Court of Appeals held that: (1) prosecutor did not violate duty to disclose impeaching evidence regarding government witness or knowingly permit witness to testify falsely at trial; (2) defendant's making multiple purchases of cashier's checks under

$10,000 at different banks on same day in aggregate amount exceeding $10,000 could not be basis for money laundering conviction, although other cited conduct could; and (3) defendants convicted of distributing over 1,000 pounds of marijuana were not subject to special parole term.

Affirmed in part; reversed in part; and vacated and remanded in part.

D. Frank Winkles, Winkles, Trombley, Kynes & Markman, Tampa, Fla., for Rubenstein.

J. Stanford Lifsey, Tampa, Fla., for Vaseliades.

Jack Helinger, St. Petersburg, Fla., for Albert Papolos.

Edward T. Garland, Atlanta, Ga., Ernon N. Sidaway, III, Fort Pierce, Fla., Edward A. Carhart, Coral Gables, Fla., Tom McCoun, Frank Louderback, St. Petersburg, Fla., Karen Berkowitz,

Portland, Or., John R. Hesmer, Marietta, Ga., W. Thomas Dillard, Ritchie, Fels & Dillard, Knoxville, Tenn., for defendants-appellants.

Terry Flynn, Asst. U.S. Atty., Carol Wilkinson, Sp. Atty., Dept. of Justice, Tampa, Fla., for U.S.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, VANCE and COX, Circuit Judges.

PER CURIAM:

I.

Between 1976 and 1984, the appellants in this case participated in a series of attempts to smuggle large quantities of marijuana into the United States from Colombia. The "kingpins" behind these ventures included George Meros, an attorney who supplied financial backing

for the ventures, and the Papolos brothers, who organized the distribution of the smuggled marijuana. In addition to financing the smuggling operations, Meros also provided his associates with individual financial assistance, structuring cash transactions so as to avoid the filing of Currency Transaction Reports, and establishing Swiss bank accounts to conceal the profits of the smuggling operations.

After a lengthy trial, the jury found the participants in these ventures guilty of various violations against the anti-racketeering and narcotics laws of the United States.[1] In addition, the

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[1]The drug-related charges of the indictment and the resulting verdicts are as follows.

Counts one and two charged appellants George Meros, Robert Papolos, Stephen Papolos, Albert Papolos, Michael Ferrentino, and Bernard Johnson with violating and conspiring to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c),

(d) (1982). All were found guilty of RICO conspiracy, save Johnson and two other defendants. Meros and Robert Papolos were convicted of the substantive RICO charge.

Counts three, four, and five charged George Meros with conspiracy to possess marijuana with intent to distribute, 21 U.S.C. ss 841(a)(1), (b)(6), 846 (1982), conspiracy to import marijuana, 21 U.S.C. §§ 952(a), 963 (1982), and possession of marijuana with intent to distribute. 21 U.S.C. § 841(a)(1) (1982); 18 U.S.C. § 2 (1982). Meros was found guilty on all three counts.

Count six charged Robert Papolos, Stephen Papolos, Albert Papolos, Michael Ferrentino, Bernard Johnson and Achilles Nick Vaseliades with importation of marijuana. 21 U.S.C. § 952(a) (1982); 18 U.S.C. § 2 (1982). Robert Papolos, Stephen Papolos, Ferrentino, Johnson, and Vaseliades were found guilty. Albert Papolos and two other defendants were acquitted.

Count seven charged Robert Papolos, Stephen Papolos, Albert Papolos, Michael Ferrentino, Bernard Johnson, Achilles Nick Vaseliades, John Frazier, Robert English and Michael Rubenstein with possession of marijuana in excess of 1000 pounds with intent to distribute. 21 U.S.C. § 841(a)(1) (1982); 18 U.S.C. § 2 (1982). All but Albert Papolos, Vaseliades, and one other defendant were convicted.

Count eight charged Robert Papolos,

jury found Meros and Robert Papolos guilty of various money laundering offenses.[2] Appellants now bring a host

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Stephen Papolos, Albert Papolos, Michael Ferrentino, Bernard Johnson, Achilles Nick Vaseliades, John Frazier, Robert English, Michael Rubenstein, and Linda Ferrentino with conspiracy to possess marijuana in excess of 1000 pounds with intent to distribute. 21 U.S.C. §§ 841(a)(1), (b)(6), 846 (1982). All but Albert Papolos and one other defendant were found guilty.

Count nine charged appellants Stephen Papolos, Michael Ferrentino, Bernard Johnson, and Linda Ferrentino with interstate travel in aid of racketeering. 18 U.S.C. §§ 2, 1952 (1982). All were convicted; one other defendant was acquitted.

Count ten is not relevant to this appeal.

[2]The charges in the indictment relating to the venture's money laundering activities are as follows.

Counts eleven, twelve, and thirteen charged appellants George Meros and Robert Papolos with utilizing a wire transfer in foreign commerce to facilitate unlawful activity, 18 U.S.C. § 1952 (1982), conspiring to commit an offense against or to defraud the United States, 18 U.S.C. § 371 (1982), and traveling in foreign commerce to

of challenges to their convictions. Three of the appellants' contentions raise issues that have some precedential value; we discuss them in turn.[3]

II.

A.

Appellants John Frazier, Michael Ferrentino, Linda Ferrentino, and Stephen

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facilitate unlawful activity. 18 U.S.C. § 2, 1952 (1982). Meros and Robert Papolos were convicted on all three counts; one other defendant was charged in counts twelve and thirteen, but found innocent.

Counts fourteen through twenty-five charged appellant George Meros with violating currency transaction requirements. 31 U.S.C. §§ 1081, 1059 (1976); 18 U.S.C. §§ 2, 1001 (1982). Meros was convicted of counts fourteen through twenty-two, and count twenty-five; Meros was found innocent of counts twenty-three and twenty-four.

[3]Appellants' other challenges are without merit; we dispose of them in an unpublished opinion issued simultaneously with this published opinion.

Papolos argue that they are entitled to a new trial on grounds that the prosecutor allegedly violated his obligation to disclose impeaching evidence regarding one of his witnesses and knowingly permitted that witness to testify falsely at trial. The facts pertinent to this claim are as follows. Alexander Biscuiti, a co-conspirator who had entered into a plea agreement with the Government and had been sentenced to prison by the district court, was the Government's principal witness in support of its claim that appellants imported 80,000 pounds of marijuana from Colombia in July 1981. Prior to trial, appellants moved the court to compel the prosecutor to disclose all information of an impeaching nature regarding Biscuiti and all inducements or promises the Government made to him in return for his testimony. The court ordered the

Government to supply the requested information to the extent required by the Supreme Court's holdings in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The prosecutor responded by apprising appellants of the existence of a transcript of Biscuiti's September 7, 1984 bail hearing. At this hearing, Biscuiti sought to reduce the one and one-half million dollar bond that the court had previously required him to post. The Government, however, contended that the court should deny Biscuiti's motion to reduce the amount of his bond on the grounds that Biscuiti associated with a violent crowd and that he had been reluctant to surrender himself to the authorities upon the issuance of a warrant for his arrest. The Government also gave appellants an unredacted copy

of a tape-recorded phone conversation between Biscuiti and his associate, Joey Cam, who had since been the victim of a "gangland-style murder."

Before Biscuiti was called to the stand at trial, appellants learned that Biscuiti was a Government witness in another criminal case, pending in the Northern District of Georgia, and that he had recently been indicted in a drug prosecution in the Eastern District of Pennsylvania. Appellants' counsel informed the court of these matters and moved the court to compel the Government to make available all information relating to the Georgia and Pennsylvania cases which would tend to impeach Biscuiti in the present case, including any negotiations or deals the Government may have made with him. In response to the court's inquiry, the prosecutor stated that the Government had not

entered into any plea agreement with Biscuiti regarding the Atlanta case, and with regard to the Pennsylvania case, he declared:

I submit to the court that any negotiations between this witness' attorney and law enforcement or prosecutorial officials regarding another indictment in another (jurisdiction) that has not been reduced to writing and that may or may not be in the works or in the preliminary stages is not (Brady or Giglio material). It's not anything in our possession and it's, quite frankly, none of our business.

The court accordingly denied appellants' motion on the grounds that the requested information was not in the Government's possession for purposes of Brady and that the information was known and available to the defense.

At trial, Biscuiti testified that he

had voluntarily turned himself in to the authorities upon learning of the existence of a warrant for his arrest. A few days after the conclusion of Biscuiti's testimony and cross-examination, appellants obtained from the court reporter the transcript of Biscuiti's bond reduction hearing, at which the Government had argued that Biscuiti's surrender had been "reluctant." Appellants moved the court to reopen the cross-examination of Biscuiti based on the content of the transcript of the hearing or else to declare a mistrial. The district court denied appellants' motion on the ground that appellants had already conducted an exhaustive four-day cross-examination of Biscuiti which covered every conceivable facet of his life including the circumstances of his surrender upon learning of the warrant for his arrest.

Appellants contend that the prosecutor violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to provide the defense with evidence upon which the Government had based its arguments at the bond reduction hearing and by failing to apprise defense of alleged plea negotiations between Biscuiti and the Georgia and Pennsylvania authorities.

Appellants also argue that the prosecutor violated Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), by failing to correct Biscuiti's allegedly false testimony that he had turned himself in upon learning of the warrant for his arrest. We discuss these issues in order.

1.

(1) In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that "the

suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87, 83 S.Ct. at 1196-97. The Supreme Court has determined that "(i)mpeachment evidence, ( ) as well as exculpatory evidence, falls within the Brady rule." See United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). To establish a Brady violation a defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence), see id.; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence, see United States v. Valera, 845 F.2d 923, 927-28 (11th

Cir.1988); (3) that the prosecution suppressed the favorable evidence, see United States v. Burroughs, 830 F.2d 1574, 1577 (11th Cir.1987), cert. denied sub nom. Rogers v. United States, --- U.S. ----, 108 S.Ct. 1243, 99 L.Ed.2d 442 (1988); and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different, see Bagley, 473 U.S. at 682, 105 S.Ct. at 3383.

(2) With respect to the allegation that the Government suppressed impeaching evidence upon which it based its arguments at Biscuiti's bond reduction hearing, we conclude that appellants have failed to make the requisite showing to establish a violation of Brady. Our review of the transcript of the hearing convinces us that the alleged nondisclosed evidence never existed.

Rather, the Government told the court during the hearing that its arguments were based solely on the tape recorded conversation between Biscuiti and Joey Cam--made available to the defense prior to trial--and on the testimony of Special Agent Robert Mazur of the United States Customs Service.

That the defense did not promptly obtain from the court reporter the transcript of Mazur's testimony and the Government's arguments at the hearing is of no moment since defense counsel had been informed prior to trial of the existence of the allegedly favorable information but did not pursue it. As we stated in Valera, " '(T)he government is not obliged under Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.' " 845 F.2d at 928 (quoting United States v. Prior, 546 F.2d 1254,

1259 (5th Cir.1977)).

(3) Appellants' allegations concerning possible plea negotiations between Biscuiti and the Georgia and Pennsylvania authorities similarly fail to meet the requirements of Brady. The district court noted that defense counsel, through conversations with Biscuiti's attorney, had apparently learned more about Biscuiti's involvement in the Georgia and Pennsylvania cases than had the prosecutor. Therefore, no Brady violation could have occurred since defense counsel knew, prior to Biscuiti taking the witness stand, that Biscuiti might have been engaging in plea negotiations with Georgia and Pennsylvania authorities and was in as good a position as the prosecutor to learn more about such negotiations through reasonably diligent efforts. See Valera, 845 F.2d at 927-28.

(4) In addition, the information in question was not, as required by Brady, in the possession of the Government. Brady and its progeny apply to evidence possessed by a district's " 'prosecution team,' which includes both investigative and prosecutorial personnel." See United States v. Antone, 603 F.2d 566, 569 (5th Cir.1979) (citations omitted).[4] Brady, then, applies only to information possessed by the prosecutor or anyone over whom he has authority. A prosecutor has no duty to undertake a fishing expedition in other jurisdictions in an effort to find potentially impeaching evidence every time a criminal defendant makes a Brady request for information regarding a government witness. In this

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[4]In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

case, the record shows that the prosecutor searched for any promises that may have been made in the Northern District of Georgia and the Eastern District of Pennsylvania, and found none. Under these circumstances, we hold that the prosecutor carried out his obligations under Brady.

2.

(5)(6) When a witness conceals, through false testimony, his bias against the defendant, and the Government knows the witness has testified falsely, the Government has a duty to correct the false statement. See United States v. Rivera Pedin, 861 F.2d 1522, 1529 (11th Cir.1988); see also Bagley, 473 U.S. at 678-80, 105 S.Ct. at 3381-82; Giglio, 405 U.S. at 154, 92 S.Ct. at 766. Appellants allege that the prosecutor knew that Biscuiti was testifying falsely when he stated on cross-examination that

he had turned himself in voluntarily after learning of the warrant for his arrest. Appellants contend that the prosecutor committed a violation of Giglio by allowing this allegedly false testimony to go uncorrected and that their convictions must therefore be reversed. We disagree.

Simply put, there has been no violation of Giglio in this case since Biscuiti's testimony that he voluntarily turned himself in was true. Contrary to appellant's contention, the record does not suggest that during Biscuiti's bond reduction hearing the Government argued that Biscuiti was apprehended when he was on the verge of fleeing the state. Rather, the transcript of the bail hearing reveals only that the Government argued that the court should not reduce Biscuiti's bond because he had not turned himself in until several weeks after

learning of the warrant for his arrest. The prosecutor obviously has no duty to correct that which is not false. Moreover, even if the transcript of the hearing had demonstrated that Biscuiti lied when he testified at trial that he had turned himself in, such testimony would not have fallen within the aegis of the rule of Giglio and its progeny since the testimony did not involve a source of potential bias against the defendant. Only in cases in which the witness' false testimony conceals his possible bias against the defendant have we found Giglio 's mandate applicable. See United States v. Rivera Pedin, 861 F.2d 1522, 1529-30 (11th Cir.1988) (false testimony that witness had not tried to solicit a bribe from defendant); Moore v. Kemp, 809 F.2d 702, 719-20 (11th Cir.) (en banc), cert. denied, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987)

(false testimony that witness had not been given immunity from prosecution); Williams v. Griswald, 743 F.2d 1533, 1541-42 (11th Cir.1984) (false testimony that witness was under no pressure from anyone to testify); United States v. Antone, 603 F.2d 566, 567 (5th Cir.1979) (false testimony that witness' attorney's fees were not being paid by the state). In sum, we find no violation of Brady or Giglio.

B.

The jury found that appellant Meros structured certain financial transactions to avoid the filing of Currency Transaction Reports (CTR's), which inform the federal government of transactions involving over $10,000. See generally 31 U.S.C. §§ 5311-5322 (1982 & Supp. IV 1986). These transactions were of two types: first, a series of multiple transactions involving amounts under

$10,000 made on the same day at different banks that totaled over $10,000 when aggregated; second, a series of multiple transactions involving amounts under $10,000 made on the same day at different branches of a single bank that totaled over $10,000 when aggregated. The United States maintained that such actions violated 18 U.S.C. §§ 2, 1001 (1982) and 31 U.S.C. ss 1081, 1059 (1976) (now codified as amended at 31 U.S.C. §§ 5313(a), 5322(b) (1982 & Supp. IV 1986)).

On appeal, Meros contends that his actions were not illegal for the following reasons. First, Meros argues that the law imposes no duty on customers of financial institutions to ensure that the institution files a CTR; therefore, even if the bank failed in its duties, Meros' actions were not criminal. Second, even if the law did impose such a duty, Meros argues that his actions did

not cause the involved institutions to fail to file CTR's.

Third, Meros argues that our cases have found such causation only when the customer's actions were fraudulent or deceitful; because his actions were done openly, without any attempt to conceal his identity, Meros argues that he cannot be a proximate cause of the banks' failure to file the CTR's. Finally, Meros argues that he had no notice that his actions were criminal.

In 1981--the year in which these transactions occurred--the currency laws of the United States provided as follows:

> Whoever willfully violates any provision of this chapter ("Reports of Currency and Foreign Transactions") where the violation is--
>
> (1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

31 U.S.C. § 1059 (1976) (recodified, as amended, at 31 U.S.C. § 5322 (1982 & Supp. IV 1986)).

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

31 U.S.C. § 1081 (1976) (recodified, as

amended, at 31 U.S.C. § 5313 (1982)). Our precedent makes clear that the regulations promulgated pursuant to these provisions, see 31 C.F.R. § 103 (1981), solely regulate financial institutions, not customers of those institutions. See United States v. Tobon-Builes, 706 F.2d 1092, 1097 (11th Cir.1983) (noting, however, that the statute itself would allow the Secretary to impose the same duties on customers).

Nevertheless, the scope of the criminal liability for violations of these currency laws is wider than the scope of the regulatory scheme. The criminal laws of the United States provide that:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to

be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (1982).

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1982). This circuit has repeatedly recognized that actions by a customer that cause a financial institution to abrogate its duty

to file a CTR are criminal, in violation of these provisions. See United States v. Cure, 804 F.2d 625 (11th Cir.1986); United States v. Giancola, 783 F.2d 1549 (11th Cir.), cert. denied, 479 U.S. 1018, 107 S.Ct. 669, 93 L.Ed.2d 721 (1986); United States v. Denemark, 779 F.2d 1559 (11th Cir.1986); United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir.1983); United States v. Thompson, 603 F.2d 1200 (5th Cir.1979). Contra United States v. Gimbel, 830 F.2d 621 (7th Cir.1987); United States v. Larson, 796 F.2d 244 (8th Cir.1986); United States v. Reinis, 794 F.2d 506 (9th Cir.1986).[5]

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[5]In their briefs, appellant Meros urges us to reverse our previous decisions and take the position adopted by several of our sister circuits. Initially, we note that under the rules of the Eleventh Circuit, only the en banc court may reverse established precedent. Even, however, if we could depart from our previous decisions, we would not do so. We consider our approach to the instant provisions as

(7) Count fourteen of the indictment in this case charged Meros with violating 18 U.S.C. § 1001 (1982) by making multiple purchases of cashier's checks under $10,000 at different banks on the same day. Before 1982, title 31 imposed a duty to file CTR's only upon individual financial institutions. Thus, in United States v. Denemark, 779 F.2d 1559 (11th Cir.1986), we held that multiple transactions at different banks on the same day, none of which exceeded $10,000 at an individual institution, did not violate the provisions of section 1001. The various institutions had no duty to report the transactions; the customer's structuring of his transactions in amounts under $10,000 therefore did not cause the banks to abrogate any duty.

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mandated both by the language of the statutes involved and by the intent of the Congress.

Appellant Meros' conviction on count fourteen must therefore be reversed.

(8)(9) Meros' other convictions were predicated on a series of transactions in amounts under $10,000 made on the same day at different branches of the Landmark Bank. We are convinced that Meros' actions fall within the scope of criminal liability established by our previous decisions. These decisions clearly hold that a customer can be the proximate cause of a bank's failure to file a CTR, and thus liable. See United States v. Cure, 804 F.2d 625 (11th Cir.1986); United States v. Giancola, 783 F.2d 1549 (11th Cir.1986); United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir.1983). Moreover, while fraudulent or deceptive conduct may aggravate the illicit nature of the offense, we do not think such conduct is necessary for liability under title 18: it is enough

that the customer "induces" an offense against the United States, 18 U.S.C. § 2(a) (1982), or participates in a scheme to conceal a material fact. See 18 U.S.C. § 1001 (1982). Finally, we note that Meros, a practicing attorney for over twenty years, was given adequate notice in 1981 of the criminal nature of his conduct by both statute and a previous decision of this court, then part of the Fifth Circuit. See United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979). With the exception of count fourteen, Meros' convictions arising out of these financial transactions are therefore affirmed.

C.

(10) Appellants Stephen Papolos, Robert English, Michael Ferrentino, and Bernard Johnson were each convicted of violating 21 U.S.C. § 841(a) (1982), which makes it an offense to distribute over 1000 pounds

of marijuana. Each appellant was sentenced to terms of incarceration ranging from two to fifteen years, fined various amounts, and given a special parole term of two years.

At the time of appellants' offenses,[6] section 841 read as follows:

(b) Penalties

Except as otherwise provided in section 845 of this title, any person who (distributes a controlled substance) shall be sentenced as follows:

....

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[6]Section 841(b)(6) was repealed on October 12, 1984. See Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, § 502(5), 98 Stat.2069. Under the new sentencing scheme, individuals convicted of offenses involving over 1000 kilograms of marijuana are subject to a 10 year to life term of imprisonment, a $4,000,000 fine, and a minimum 5 year special parole term. See 21 U.S.C. § 841(b)(1)(A) (Supp. IV 1986). The statutory construction question that we decide in the instant case is thus not relevant to the current statutory penalty scheme.

(1)(B) In the case of a controlled substance in schedule I (i.e. marijuana) or II which is not a narcotic drug ... such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.... Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of ( ) a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment....

....

(6) In the case of (the distribution of a controlled substance) involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000.

21 U.S.C. § 841(b) (1982). Appellants contend that since their offense is controlled by the penalties imposed by section 841(b)(6), they are not subject to the two-year parole term imposed by section 841(b)(1)(B). The United States vehemently disagrees, arguing that such an interpretation would have the anomalous result that the two year parole term would affect only small-time traffickers, while the kingpins would escape the penalty.

Congress amended 21 U.S.C. § 841(b) in 1980 to add section (b)(6). See Infant Formula Act of 1980, Pub.L. No. 96-359, § 8(c), 94 Stat. 1190, 1194. The legislative history accompanying the amendment indicates that Congress intended to increase the penalties for offenses involving large amounts of marijuana in order to deter large scale trafficking. Significantly, the

legislative history does not mention the special parole term, although the other possible penalties are discussed. See S.Rep. No. 916, 96th Cong., 2d Sess. 14, reprinted in 1980 U.S.Code Cong. & Admin.News 2858, 2871; H.R.Rep. No. 936, 96th Cong., 2d Sess. 13 (1980).

When interpreting a criminal statute, the "rule of lenity" requires strict construction. See United States v. Rojas, 671 F.2d 159, 163 (5th Cir. Unit B 1982).[7] Although the result may appear incongruous, we conclude that

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[7]In Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

Congress could have believed that the stiffer penalties provided for in section 841(b)(6) were a sufficient deterrent and that a special parole term was not necessary. In light of this possible rationale, we conclude that individuals sentenced under 21 U.S.C. § 841(b)(6) may not be given a special parole term. The district court erred in so sentencing the appellants. Because the district court may have taken the special parole term into account in fashioning appellants' sentences under 21 U.S.C. 841(b)(6), we vacate those sentences and remand for resentencing.

III.

In conclusion, the conviction of appellant Meros under count fourteen is reversed. In addition, we vacate the sentences imposed on appellants Stephen Papolos, Robert English, Michael Ferrentino, and Bernard Johnson under 21

U.S.C. § 841(b)(6). In all other respects, the appellants' convictions are affirmed.

AFFIRMED IN PART; REVERSED IN PART; AND VACATED AND REMANDED IN PART.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 85-3774

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D.C. Docket No. 84-76

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE N. MEROS,
JOHN FRAZIER, d/k/a/ J.J.,
MICHAEL FERRENTINO,
LINDA DEEMER FERRENTINO,
MICHAEL RUBENSTEIN,
ACHILLES NICK VASELIADES,
BERNARD H. JOHNSON,
ROBERT ENGLISH,
ALBERT H. PAPOLOS,
STEPHEN P. PAPOLOS,
ROBERT J. PAPOLOS,

Defendants-Appellants.

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Appeal from the United States District Court for the Middle District of Florida

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(February 13, 1989)

UNPUBLISHED SUPPLEMENT TO OPINION
PUBLISHED AT ____ F.2d ____

Before TJOFLAT, VANCE and COX, Circuit Judges.

PER CURIAM:

I.

This case revolves around a series of drug smuggling ventures and accompanying financial transactions designed to conceal the resulting profits.[1]

A.

In the fall of 1976, David Strongosky, David Capo and Albert Papolos conspired to import 20-30,000 pounds of marijuana into the United States. Albert Papolos agreed to provide Colombian marijuana and to finance the venture; Capo agreed to provide a shrimp boat, crew, and off-load site and to assist in distribution; Strongosky acted as a broker. On January 27, 1977, the venture achieved its objective when the Gunsmoke off-loaded its cargo of marijuana at Sandy Creek, near Panama City, Florida. Capo turned over $350,000 of the proceeds from the marijuana's sale to Strongosky,

who in turn forwarded $300,000 to Stephen Papolos. Stephen Papolos' brother, Albert Papolos, later demanded an additional $50,000 from Capo, who tendered the money via Strongosky and Stephen Papolos.

At some point during or following this venture, the Papolos brothers introduced Strongosky to their attorney, George Meros. Meros advised Strongosky on how to launder the proceeds of the drug transactions. As their relationship progressed, Meros questioned Strongosky about the details of drug smuggling operations.

In late 1978, Meros and Byron Wever conspired to smuggle 60,000 pounds of marijuana into the United States. Meros agreed to finance the venture and to provide protection for off-loading the cargo in the Charleston, South Carolina area by contacting a "Mr. C," who would divert any Coast Guard vessels that

threatened the off-loading operation. Wever, in turn, was to purchase a boat, equip it, hire a crew, find Colombian suppliers, and negotiate the marijuana's price. Wever subsequently purchased the Mis Vicki with $200,000 in cash provided by Meros, and in November 1978, Meros gave Wever an additional $140,000 in cash as a down payment on the marijuana.

In December 1978, the Mis Vicki traveled to Columbia from Tarpon Springs, Florida. Upon reaching the on-load site in Colombia, however, the boat was fired on by the Colombian army. On being informed of this, Meros and Wever instructed the Mis Vicki's master to bring the vessel back empty to Florida. Meros and Wever sent the Mis Vicki back down to Columbia after Christmas. This time the boat was able to pick up its load of marijuana, and it began to return to the off-load site, which now

was in Camden County, Georgia.

On January 23, 1979, the Mis Vicki ran into rough weather off the Georgia coast. Wever telephoned to Meros and asked whether Meros could use his connection with the Coast Guard to clear a landing site in South Carolina. Meros, however, instructed Wever to land at the Georgia site immediately. Unknown to Wever and Meros, however, the Georgia site had been infiltrated by agents of the Georgia Bureau of Investigation. When the Mis Vicki landed, these agents were able to seize the vessel, its cargo of 52,000 pounds of marijuana and to arrest the crew and longshoremen.

Upon learning of the seizure, Meros advised Wever and his wife to flee across the state line to Jacksonville in order to avoid arrest and to make extradition to Georgia more difficult. The Wevers were

subsequently arrested, at which time agents seized a personal check written by Meros to Wever for $20,000. The check was to reimburse Wever for smuggling expenses, although Meros later faked a contract for the sale of a condominium owned by Wever and attempted to explain the $20,000 payment as the proceeds of the sale. Meros personally posted a $300,000 bond for the Wevers and negotiated bonds for the crewmen as well.

At the same time Meros and Wever were engaged in the Mis Vicki venture, Meros, Strongosky, and Wever were putting together another smuggling venture. Meros agreed to finance the purchase and voyage of a vessel to Colombia and to provide a protected off-load site in the United States, as well as bond money and attorneys fees for the participants if the venture should fail, Wever agreed to load the boat with

marijuana provided by his Caribbean connection.

In January 1979, Meros gave Strongosky about $100,000 in cash to purchase the Toots. Strongosky purchased the craft, and spent an additional $80,000 equipping the vessel to import 20,000 pounds of marijuana. Meros gave Wever $75,000 as a down payment on the marijuana. The Toots left the United States in March 1979, but soon developed leaks and damage to its hull. As a result, the Toots pulled into the Grand Cayman Islands for repairs, which Strongosky financed. The crew eventually abandoned the vessel at a Grand Cayman marina. In order to complete the deal, Wever purchase a boat called the Mystar for about $70,000. On March 15, 1980, the Mystar was seized by the Coast Guard in the Gulf of Mexico along with its cargo of 8,475 pounds of marijuana.

During the fall of 1980, Pete Sattler, a business partner of Michael Ferrentino, asked Strongosky to locate a boat for a new marijuana deal. The purpose of this venture was to recoup losses that Ferrentino and the Papolos brothers had sustained on a 1980 deal. Through a series of indirect contacts, Strongosky and Ferrentino eventually approached Don McCoy, who agreed to locate, purchase, rig and captain a vessel that would make two trips to Rio Hacha, Colombia to pick up 80,000 pounds of marijuana. McCoy was told that the venture was being backed by "The Greeks" from Tampa.

The initial off-load site for the venture was in the Beaufort, South Carolina area. Nevertheless, an intermediary for Ferrentino, Alex Biscuiti, contacted Joey Cam in order to locate an alternative site. Cam put Biscuiti in contact with John

"J.J." Frazier, who controlled a protected off-load site at Cape Canaveral, Florida. Cam surreptitiously recorded the conversations between Biscuiti and Frazier. Through intermediaries, Nick Vaseliades, a business partner of Robert Papolos, sent McCoy navigational charts and maps to both off-load sites.

In April 1981, McCoy found a suitable vessel named the Brinney Louise. Vaseliades delivered about $50,000 in cash to McCoy through an intermediary to serve as a down payment on the vessel. After making repairs and modifications, the Brinney Louise left Florida for an oil rig off Rio Hacha, Colombia. When the boat was not met, it traveled to San Andreas Island, Colombia, which was the alternate on-load site. When the Brinney Louise reached San Andreas Island, it was arrested subject to payment of a $15,000 fine. Strongosky

eventually raised the $15,000 and sent Bernard Johnson to Colombia to deliver the cash to McCoy. Johnson was acting on behalf of Thomas Powell, a Michigan drug dealer. Johnson also instructed McCoy to use the alternate Cape Canaveral off-load site because the Beaufort, South Carolina site had become "too hot."

In late May, the Brinney Louise was allowed to leave San Andreas Island, but the ship soon encountered a storm, suffered damage, and was towed to Cartagena, Colombia. Strongosky and the Papolos brothers sent Johnson to Colombia with $15,000 to effect repairs. The Brinney Louise left Cartagena on June 30, 1981, and was loaded with 27,000 pounds of marijuana off the coast of Tonga, Colombia. The vessel docked at Port Canaveral on July 30, 1981.

After meeting with Strongosky in

Clearwater (Florida), Ferrentino, Pete Sattler, Robert English, and Frazier traveled to Port Canaveral to supervise the off-loading of the marijuana. McCoy was promised $625,000 in marijuana; alternately, he could accompany Ferrentino to New York and receive his fee in cash proceeds following the sale of the marijuana. McCoy chose the latter option. Frazier paid Biscuiti with 1500 pounds of marijuana; the crew received $2000 each.

On July 31, 1981, the Brinney Louise was off-loaded while local Coast Guard employees were having a party arranged by Ferrentino. The following day, McCoy, Ferrentino, English and the others convoyed 20,000 pounds of marijuana to New York. An additional 2000 pounds of marijuana was brought to Fort Pierce, Florida, and distributed by Frazier. Problems in the distribution and sale of the marijuana soon

brought McCoy, Michael Rubenstein, Sattler, Ferrentino, Strongosky, and Stephen Papolos together for a series of meetings.

At about this time, McCoy was faced with the need to make the scheduled payment on the Brinney Louise. Ferrentino's wife, Linda, carried the payment by hand from New York to Florida in cash--as an airline flight attendant, her luggage was not subject to examination. During this same period, Ferrentino, McCoy, English and others transported 2000 pounds of the marijuana to Michigan, where it was delivered to Johnson.

Distribution of the marijuana continued to proceed very slowly and resulted in a meeting between the American and Colombian factions in New York City's Central Park. Those attending included Stephen Papolos, Strongosky, Ferrentino, McCoy, and Johnson.

Seven thousand five hundred pounds of marijuana previously had been stolen from the stash house, which was located in upstate New York. Ferrentino believed that Michael Rubenstein, a distributor, knew the location of the stolen marijuana and Ferrentino paid Biscuiti $10,000 to threaten Rubenstein to return the stolen drugs. Biscuiti took Rubenstein to the Brooklyn Bridge and threatened to throw him off unless he returned the marijuana; the next day, Rubenstein returned 2500 pounds of marijuana to Ferrentino. Subsequently, Ferrentino, Linda Ferrentino, Stephen Papolos, Rubenstein, Biscuiti, Sattler, and others met to discuss how to retrieve the additional 5000 pounds of stolen marijuana and to resolve a dispute over the distribution of profits.

On October 28, 1981, Customs officials seized the Brinney Louise. Two days later,

Strongosky, Stephen Papolos, Sattler, and Linda and Michael Ferrentino met at the Ferrentino's home in Crystal Beach, Florida to discuss the seizure. Stephen Papolos subsequently gave McCoy money for attorneys' fees in the forfeiture proceedings.

The slowness of the payments from the sale of the marijuana continued to necessitate additional meetings throughout the fall of 1981. McCoy, the Ferrentinos, Rubenstein, Stephen Papolos, Sattler, Biscuiti, and Vaseliades all participated in these meetings. Strongosky eventually met with Robert Papolos to resolve threats that McCoy had made against the Papolos family because of the slow pace of the payments. Meros contacted a client named Jo Jo Birchfield and asked him to tell McCoy to stop pressuring the Papolos family. The wrangling over the money was

not finally resolved until early 1982. By that time, Ferrentino, Frazier and Biscuiti also had learned that Florida law enforcement officials had intercepted conversations on Biscuiti's telephone and on five pay telephones.

In addition to providing financial backing for drug smuggling, Meros also offered financial advice and services to various participants in these ventures. Specifically, Meros showed his clients how to structure bank transactions in order to avoid the filing of Currency Transaction Reports, which inform the federal government of bank transactions involving over $10,000; Meros also offered money laundering services through Swiss bank accounts and real estate transactions.

Throughout the smuggling ventures described above, Meros repeatedly advised participants to make all bank transactions

in amounts under $10,000. Thus, in late 1978, Meros instructed Wever to deliver the down payment for the Mis Vicki by means of eight wire transfers, each for $9500; the $140,000 necessary as a down payment on the Mis Vicki's load of marijuana was also converted into cashier's checks of $9000 on Meros' instructions. Similarly when Meros began to organize the Toots venture, he made the down payment on the marijuana by means of cashier's checks in amounts under $10,000. Because of Meros' advice, Wever and Robert Papolos also began to use cashier's checks of under $10,000 to structure their transactions. Meros also instructed his bookkeeper, Barbara Ermatinger, to structure his real estate transactions in amounts under $10,000.

Meros also offered general money laundering services for a ten percent fee and assisted the depositors with financial

transactions involving these monies. Specifically, Meros opened Swiss bank accounts for himself, David Capo, Mark Knight, Albert Papolos, and Robert Papolos. Money from these accounts was then returned to the depositors through bogus loans from nonexistent corporations. Meros further counseled depositors on how to fill out false income tax returns that concealed the sources of these funds.

Meros and Robert Papolos used the drug monies deposited in their Swiss bank accounts to finance a real estate venture in North Reddington Beach, Florida, called "Grand Shores West." Albert and Stephen Papolos were also partners in the venture, which was a gulf-front condominium time share project. Meros concealed the cash transactions for this project by depositing monies in amounts under $10,000 at multiple branches of the Landmark Union Trust Bank.

C.

On May 25, 1984, a grand jury in the Middle District of Florida returned a twenty-five count indictment against appellant George Meros and twenty-one other individuals.[2] That indictment and resulting verdicts are as follows:

Counts one and two charged appellants George Meros, Robert Papolos, Stephen Papolos, Albert Papolos, Michael Ferrentino, and Bernard Johnson with violating and conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c), (d) (1982). All were found guilty of RICO conspiracy, save Johnson and two other defendants. Meros and Robert Papolos were convicted of the substantive RICO charge.[3]

Counts three, four, and five charged appellant George Meros with conspiracy to

possess marijuana with intent to distribute, 21 U.S.C. §§ 841(a)(1), (b)(6), 846 (1982), conspiracy to import marijuana, 21 U.S.C. §§ 952(a), 963 (1982), and possession of marijuana with intent to distribute. 21 U.S.C. § 841(a)(1) (1982); 18 U.S.C. § 2 (1982). Meros was found guilty on all three counts.

Count six charged appellants Robert Papolos, Stephen Papolos, Albert Papolos, Michael Ferrentino, Bernard Johnson and Achilles Nick Vaseliades with importation of marijuana. 21 U.S.C. § 952(a) (1982); 18 U.S.C. § 2 (1982). Robert Papolos, Stephen Papolos, Ferrentino, Johnson, and Vaseliades were found guilty. Albert Papolos and two other defendants were acquitted.

Count seven charged appellants Robert Papolos, Stephen Papolos, Albert Papolos, Michael Ferrentino, Bernard Johnson,

Achilles Nick Vaseliades, John Frazier, Robert English and Michael Rubenstein with possession of marijuana in excess of 1000 pounds with intent to distribute. 21 U.S.C. § 841(a)(1) (1982); 18 U.S.C. § 2 (1982). All but Albert Papolos, Vaseliades, and one other defendant were convicted.

Count eight charged appellants Robert Papolos, Stephen Papolos, Albert Papolos, Michael Ferrentino, Bernard Johnson, Achilles Nick Vaseliades, John Frazier, Robert English, Michael Rubenstein, and Linda Ferrentino with conspiracy to possess marijuana in excess of 1000 pounds with intent to distribute. 21 U.S.C. §§ 841(a)(1), (b)(6), 846 (1982). All but Albert Papolos and one other defendant were found guilty.

Count nine charged appellants Stephen Papolos, Michael Ferrentino, Bernard

Johnson, and Linda Ferrentino with interstate travel in aid of racketeering. 18 U.S.C. §§ 2, 1952 (1982). All were convicted; one other defendant was acquitted.

Count ten is not relevant to this appeal.

Count eleven, twelve, and thirteen charged appellants George Meros and Robert Papolos with utilizing a wire transfer in foreign commerce to facilitate unlawful activity, 18 U.S.C. § 1952 (1982), conspiring to commit an offense against or to defraud the United States, 18 U.S.C. § 371 (1982), and traveling in foreign commerce to facilitate unlawful activity. 18 U.S.C. §§ 2, 1952 (1982). Meros and Robert Papolos were convicted on all three counts; one other defendant was charged in counts twelve and thirteen, but found innocent.

Counts fourteen through twenty-five charged appellant George Meros with violating currency transaction requirements. 31 U.S.C. §§ 1081, 1059 (1976); 18 U.S.C. §§ 2, 1001 (1982). Meros was convicted of counts fourteen through twenty-two, and count twenty-five; Meros was found innocent of counts twenty-three and twenty-four.

On August 16, 1985, a jury found the appellants guilty on various counts. Appellants now bring this appeal.

II.

Appellants present five claims of error with regard to pretrial issues.

A.

Immediately after Meros' arrest on September 26, 1983, the United States sought a warrant to search Meros' law offices.[4] Appellants Meros, Albert Papolos, Stephen Papolos, and Robert

Papolos argue that the warrant was overbroad and executed in an unreasonable manner; as a result, they argue that the trial court should have suppressed all documents seized in the search. We disagree. An examination of the warrant in question reveals that it was sufficiently narrow in scope. A search warrant need not specify particular documents; a general description of the purpose or contents of the documents suspected to be in the searched area is sufficient. The record further demonstrates that the warrants were executed in good faith: neither the inadvertent seizure of several irrelevant documents nor the posting of officers at Meros' offices twenty-four hours prior to the magistrate's issuance of the warrant renders the subsequent search unconstitutional.

B.

On August 16, 1984, the Government filed motions in the district court for leave to depose employees of the Geneva and Zurich branches of the Union Bank of Switzerland. The purpose of the foreign depositions was to authenticate Swiss bank documents, copies of which had been given to the United States through the Treaty with Switzerland for Mutual Assistance in Criminal Matters, May 28, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302.

On or about September 19, 1984, Swiss counsel for Meros and Robert Papolos filed an objection to the taking of these depositions with the Swiss Federal Department of Police Matters, which in turn notified the Swiss Federal Tribunal. The objection alleged that the United States' application for assistance under the Treaty was defective and that the Government

intended to use the depositions to secure convictions for fiscal offenses--a use forbidden under the Treaty. As a result of these objections, the taking of the depositions was delayed.

On October 10, 1984, the United States moved the district court to enjoin Meros and Robert Papolos from contesting the taking of the depositions in the Swiss Courts. Meros and Robert Papolos argued against the Government's motion, contending that the Treaty allowed them to bring objections to the Swiss courts. Specifically, they pointed to article 37 of the Treaty, which states:

> 2. The right to and procedures for appeal in Switzerland against decisions of Swiss authorities in connection with requests under this Treaty shall be regulated in accordance with this Treaty by domestic regulation.

Following a hearing, the court issued an order enjoining Meros and Robert Papolos to

withdraw their challenges and appeals to the taking of the Swiss depositions. That order stated in part:

> This Court is satisfied and will insure that any evidence or information obtained through the Mutual Assistance Treaty will be used for only those purposes authorized by the Treaty and no other. Representations and actions indicating the contrary can only serve to delay, frustrate and obstruct the interest of justice in this case.
>
> . . . .
>
> [Meros and Robert Papolos] are and each is specifically DIRECTED, ORDERED AND ENJOINED from either directly or indirectly attempting to frustrate this Court's order granting leave to take depositions or the government's request for international judicial assistance from the Swiss Confederation by seeking to litigate in that jurisdiction the propriety of this Court's order including an issue properly within the scope of Rule 15, Fed. R. Crim. P.

Robert Papolos argues that the district court abused its discretion when it enjoined himself and Meros from taking

legal action in the Swiss courts.

We conclude that this issue is moot. At trial, the bank documents were authenticated by the testimony of Jean-Luc Calame, a vice president of the Union Bank of Switzerland residing in the United States. In addition, we note that despite the district court's order, Meros and Papolos did have their "day in court" before the Swiss authorities.[5] As a result, we conclude that neither Meros nor Robert Papolos were prejudiced by the court's order and injunction.

C.

Appellant Nick Vaseliades argues on appeal that the trial court erred in denying his pretrial motion for a bill of particulars may be reversed only when the denial constitutes an abuse of the trial court's discretion. Such an abuse of discretion only occurs when a "defendant

[is] actually surprised at trial and thereby incurred prejudice to his substantial rights." United States v. Cole, 755 F.2d 748, 760 (11th Cir. 1985). Appellant fails to meet this heavy burden.

D.

On appeal, Linda Ferrentino, John Frazier and Robert English claim that the district court erred in denying their motions for severance and that they were prejudiced by the resulting "spillover" of evidence regarding their codefendants' RICO activities.[6] All the defendants in this case were involved in drug smuggling--specifically, in the Brinney Louise venture. This common factual element satisfies the requirements of Fed. R. Crim. P. 8 that joined defendants "have participated in the same act or transaction or in the same series of acts or

transactions." Given that joinder was proper, Fed. R. Crim. P. 14 allows severance only if the moving party can show prejudice. On appeal, we will not reverse the decision of the district court to grant or deny severance absent an abuse of discretion.

Upon examining the facts of this case, we find no such abuse. The law favors joint trial of joint participants in a criminal enterprise. See United States v. Astling, 733 F.2d 1446, 1454 (11th Cir. 1984). This is especially true of defendants charged as co-conspirators. See United States v. Esle, 743 F.2d 1465, 1476 (11th Cir. 1984). Such defendants should be tried separately only if prejudice is compelling. See United States v. Sans, 731 F.2d 1521, 1533 (11th Cir. 1984), cert. denied, 469 U.S. 1111 (1985). In this case, the Government took great pains to

caution the jury when it presented evidence that applied only to certain defendants. We have recognized that such instructions are adequate protection from prejudice allegedly caused by a joint trial. See United States v. Butera, 677 F.2d 1376, 1385-86 (11th Cir.), cert. denied, 459 U.S. 1108 (1982). Moreover, an examination of the varied verdicts rendered by the jury convinces us that no prejudice in fact resulted as a result of the joint trial.

E.

Appellant Nick Vaseliades contends that the ten-month delay[7] between his indictment and his trial violated the provisions of the Speedy Trial Act, 18 U.S.C. § 3161 (1982 & Supp. IV 1986). We find no merit in this claim. The Act clearly provides that no violation arises for delay attributable to codefendants. Id. § 3161(h)(7). In this case, much of

this delay resulted from continuances requested by the Government in order to obtain information and business records from Switzerland that were necessary to pursue its case against Vaseliades' codefendants.[8] Under the Act, such delay is excusable. See id. §3161(h)(9) (excusing delay "ordered by a district court upon an application of a party . . . [if] an official request, as defined in section 3292 of this title [discussing requests for assistance from foreign governments] has been made for evidence"). Vaseliades, therefore, was not denied his rights under the Speedy Trial Act. Although we conclude that Vaseliades has no valid claim under the Speedy Trial Act, Vaseliades' speedy trial situation provides support for his argument that the trial court abused its discretion in failing to grant his motion for severance.

Vaseliades was charged with importation of marijuana, 18 U.S.C. § 2 (1982); 21 U.S.C. § 952(a) (1982), and possession and conspiracy to possess marijuana in excess of 1000 pounds with intent to distribute, 21 U.S.C. §§ 841(a)(1), (b)(6), 846 (1982). Vaseliades first moved for severance on July 5, 1984; he moved for dismissal under the Speedy Trial Act on September 6, 1984. The trial began on March 25, 1985. Vaseliades renewed all of his motions at the close of the Government's case on June 25, 1985. Vaseliades maintains that he was prejudiced "in having to attend the labors of a five [to] six month trial when he could have just as easily been tried with McClain Davis [another individual separately prosecuted in connection with the drug transactions at issue here] in a trial that lasted 10 days."

One authority has stated:

> There is no specific reference in the legislative history to the possibility that the time limit for a defendant might run out before that of a codefendant because of excludable time applicable to the codefendant. However, paragraph (h)(7) also accommodates this situation. Those courts of appeals that have considered the question have held that the provision operates to make each defendant's exclusions applicable to all the defendants who are joined.

Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, Guidelines to the Administration of the Speedy Trial Act of 1974 at 57-58 (as amended 1984). The Guidelines, however, go on to state that "[t]he exclusion under this paragraph is for 'a reasonable period.' Presumably, if one of the defendants could not be brought to trial for an inordinate period, severance under Rule 14 would be appropriate." Id. at 58. Thus, the

question before us is whether the trial court, knowing of Vaseliades' speedy trial situation, abused its discretion in denying his motion to sever. While we think that the district court could have allowed severance to protect Vaseliades' speedy trial rights, we cannot conclude that the court abused its discretion in denying severance on the facts of this case.

III.

Appellants present twelve claims of error that arose at trial. We discuss four of these claims; the others are frivolous.

A.

Appellants point to numerous instances where the district judge restricted the cross-examination of certain government witnesses.

1.

At trial, Meros attempted to establish through cross-examination of Government

witnesses that Carol Wever's brother, Vinnie Carone, was the "money man" behind the smuggling operation. This theory contended that the Government's witnesses were framing Meros to protect Carone. On cross-examination, these witnesses without exception either denied Carone's involvement in the drug ventures or failed to recall conversations and events that Meros alleged would establish his innocence.

Blocked by the denials of the Government's witnesses, Meros attempted to introduce testimony from GBI Agent Harry Coursey--who had infiltrated the smuggling operation--concerning conversations that Coursey had had with the Government witnesses during the course of the conspiracy in which they stated that Carone, not Meros, was their partner in the smuggling ventures. The district court

refused to admit this evidence, finding it to be hearsay outside the scope of any exception. On appeal, Meros maintains that this evidence was admissible under Fed. R. Evid. 801(d)(2)(E) (co-conspirator's statements not hearsay) or 803(24) (catch-all hearsay exception).[9]

Federal Rule of Evidence 801 provides that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E) (1988). Using this provision, the United States was able to introduce statements by co-conspirators that incriminated Meros. The wording of the provision, however, prevents Meros from doing the reverse: introducing testimony of co-conspirators that would exculpate Meros. Such testimony would not be

"offered against a party," but rather on behalf of a party. As such, exculpatory statements of co-conspirators fall outside of Rule 801(d)(2)(E)'s exception to the hearsay rule. The trial court was therefore correct in refusing to admit Agent Coursey's recollection of his conversations with Meros' co-conspirators under Fed. R. Evid. 801.

Federal Rule of Evidence 803(24) provides that:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness [is admissible] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

On appeal, we must defer to the trial

court's decision on the admissibility of evidence absent an abuse of discretion. In addition, "we are particularly hesitant to overturn a trial court's admissibility ruling under the residual hearsay exception absent a 'definite and firm conviction that the court made a clear error of judgment in the conclusion it reached based upon a weighing of the relevant factors.'" Balogh's of Coral Gables, Inc. v. Getz, 798 F.2d 1356, 1358 (11th Cir. 1986) (en banc) (quoting Page v. Barko Hydraulics, 673 F.2d 134, 140 (5th Cir. 1982)). We cannot conclude that the court's refusal to allow Agent Coursey's testimony into evidence was an abuse of discretion.

2.

Meros also argues that the trial court improperly limited his cross-examination of Carol Wever concerning the smuggling activities of her brother, Vinnie Carone,

and the source of the money she used to pay her attorney's fees. Specifically, Meros points to the following ruling of the court, which refused to let Meros question Wever in detail concerning her brother's smuggling activities and her involvement in them:

> All right. Now I allowed Mr. Ragano to ask Mrs. Wever if it is part of the agreement, at her request, was the agreement on the part of her husband with the Government that she, Mrs. Wever, would not be asked about matters affecting her brother. She said that was part of the agreement and that's what she wanted.
>
> . . . .
>
> And you did ask her if her brother had participated in drug smuggling; she said he had.
>
> Now, her participation in drug smuggling with her brother, unless there was some conviction is not admissible. Rule 404 deals with that, and that is all there is to that.

In addition to this incident, Meros also contends that the court erred in

limiting his cross-examination of David Strongosky, a co-conspirator of Meros' who became a Government witness, regarding Strongosky's prior drug dealings and his involvement with the "Steinhatchee Seven," another narcotics smuggling operation. In their cross-examination, Meros sought to show:

> that instead of one organization, in fact, as charged in counts one and two, that there was not an organization. In fact, that there was instead a number of separate and, indeed, happenstance type of deals.

The court, however, found information unrelated to the ventures charged in the indictment to be irrelevant:

> I heard the name of a good many boats on direct examination. . . . You may inquire about them . . . . You may inquire about who the members of the crew were and who were the participants in those events. But just to talk about as you set out in your purpose to show a lot of unrelated enterprises which have nothing to do with this, you don't show something that didn't happen in

> this case by showing a whole lot of others. I think that is irrelevant and I'm not going to let you do that.

The scope of cross-examination is a matter that falls within the sound discretion of the trial court. On the facts of this case, we cannot conclude that the limitations imposed by the court constituted an abuse of that discretion.

3.

John Frazier, Michael and Linda Ferrentino, Bernard Johnson, Robert English, and the Papolos brothers also challenge the district court's limitation of their cross-examination. Upon examining the record, however, we conclude that the district court was remarkably liberal in the questions that it allowed appellants to ask, only closing off even very dubious lines of inquiry when prejudice clearly outweighed any relevance.

Appellants' arguments center on their

not being able to question witnesses concerning the totality of their previous criminal activities in order to reduce the witnesses' credibility. Federal Rule of Evidence 608(b) states that:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the [witness'] credibility . . . may, [] in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . .

(emphasis added). We do not think that the district court abused its discretion in limiting appellants' cross-examination in this area, especially since the relevance of the line of inquiry may well have been outweighed by confusion and prejudice. See Fed. R. Evid. 403. In addition, we cannot see how the credibility of the Government witnesses--most of whom were narcotics dealers and smugglers--could have been impaired to a significantly greater extent

by evidence of additional past crimes. Thus, even if the district court's restriction on appellants' cross-examination was improper, we cannot find any resulting prejudice.

Meros makes another argument regarding the admission of Agent Coursey's testimony--testimony that Meros believes would have established that Government witnesses were framing him as the money man behind the smuggling operations to protect Vinnie Carone. Meros asserts that his counsel told the jury in his opening statement that Agent Coursey would testify that in his conversations with Government witnesses, those witnesses denied Meros' participation in the smuggling conspiracy. Meros claims that because counsel made this guarantee, he was denied the effective assistance of counsel.

As an initial matter, we note that

claims of ineffective assistance of counsel are generally raised in collateral proceedings attacking a conviction. In such proceedings, the court has a better opportunity to examine evidence concerning the motivation and strategy of the attorney--evidence that we do not have before us at the present time. Nevertheless, some incompetence can be so egregious as to be apparent from the trial record itself. The standard governing claims of ineffective assistance of counsel was set by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors

> were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S.Ct. at 2064.

In support of his Strickland claim, Meros cites United States v. Lynn, 856 F.2d 430 (1st Cir. 1988); United States v. Mastronardo, 849 F.2d 799 (3rd Cir. 1988); and Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988). These cases involve claims of ineffective assistance of counsel arising from situations in which an attorney stated to the jury that he would present certain evidence and then failed to do so. This circuit has not been receptive to claims of ineffective assistance of counsel predicated on such situations. See Howard v. Davis, 815 F.2d 1429 (11th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 184 (1987). On the record before us, we are satisfied that Meros was not denied the effective assistance of counsel.

C.

Appellant Meros argues that the trial court erred in not granting his motion for mistrial based on his assertion that the Government improperly introduced evidence of his silence after his arrest. The statement complained of occurred when Special Agent Robert Mazur of the United States Customs Service testified concerning the events that transpired after Meros' arrest. We set forth the statements complained of in the context in which they occurred at trial as follows:

> Q. Did you advise Mr. Meros of his constitutional rights at that time?
>
> A. Yes, I did.
>
> . . . .
>
> Q. Did you ask him if he wished to waive those rights and speak to you at that time?
>
> A. Yes, and he told me that he didn't want to speak at that time.
>
> Q. What happened next?

. . . .

> A. I mentioned to him [] that based upon our investigation we had learned of his involvement in financing the MIS VICKI smuggling venture and had reason to believe that he was involved in similar activity with other clients in his firm and that there were individuals within his law firm who might have some involvement in the matter. At that time Mr. Meros made a statement to me, [in] which he said: "My family wasn't involved. I gave Byron [Wever] the money. There was no one involved in it besides me and him."

Appellant's counsel made no objection following Mazur's comment on Meros decision not to speak "at that time." The next day, however, Meros' counsel moved the court to strike the testimony as an impermissible comment on Meros' constitutional right to remain silent and also for a mistrial. The court denied the motions but informed counsel that it would give an appropriate cautionary instruction as part of the final jury instructions, which it ultimately did.

In Doyle v. Ohio, 426 U.S. 610, 96

S.Ct. 2240 (1976), the Supreme Court held that it is fundamentally unfair simultaneously to afford a suspect a constitutional right to silence following arrest and yet allow the implications of that silence to be used against him. A comment is deemed to be a constitutionally impermissible reference to a defendant's silence if "the remark is 'manifestly intended' by the prosecutor or 'would naturally and necessarily be understood by the jury' as a comment on the defendant's silence." Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987) (quoting United States v. Vera, 701 F.2d 1349, 1362 (11th Cir. 1983)). In making the determination, "the reviewing court is to consider the overall trial context of the comment." Matire, 811 F.2d at 1435. Viewing the above testimony in the context in which it was given, we cannot hold that it was the

prosecutor's manifest intention to elicit the comment on Meros' silence or that the jury would naturally and necessarily construe the testimony as a comment on Meros' silence. Instead, the statement was elicited to show the voluntariness of Meros' statement that he was involved in financing the smuggling venture which was uttered moments after he had been advised of his rights and initially said he did not want to speak.

Even if Mazur's statement were an impermissible comment on Meros' silence, we would nonetheless hold that the statement constituted harmless error. In Chapman v. United States, 547 F.2d 1240, 1248-49 (5th Cir.), cert. denied, 431 U.S. 908, 97 S.Ct. 1705 (1977),[10] we held that the harmless error doctrine is applicable to the type of alleged constitutional violation at issue here. When, as here, "'there is but a

single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error.'" Matire, 811 F.2d at 1436 (quoting United States v. Meneses-Davila, 580 F.2d 888, 893 (5th Cir. 1978)). Because of the court's curative instruction, see United States v. Smith, 635 F.2d 411, 414 (5th Cir. Unit B. Jan. 1981), and in light of the otherwise overwhelming evidence of Meros' guilt, we are compelled to conclude that the error, if any, was harmless.

D.

Appellants Nick Vaseliades and Michael and Linda Ferrentino challenge several remarks made by the prosecutor in her

closing argument. We examine each in turn.

The Government contended that Michael Ferrentino's official business had no need for the services of a truck driver; the Government thus believed that Ferrentino's employment of a driver was evidence of Ferrentino's activities in narcotics distribution. In attempting to make the point in her closing argument, the prosecutor made the following comment: "Can you recall one item of evidence in this case about what Michael Ferrentino does for a living? There is no evidence about what he does for a living." Michael Ferrentino challenges this statement as an improper reference to his refusal to testify.

The prosecution may not comment, directly or indirectly, on a defendant's failure to testify in a criminal action. See Griffin v. California, 380 U.S. 609,

615, 85 S.Ct. 1229, 1233 (1965). A particular statement will constitute a comment on the defendant's silence if "'the statement was manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of an accused to testify.'" United States v. Zielie, 734 F.2d 1447, 1461 (11th Cir. 1984) (quoting United States v. Deardon, 546 F.2d 622, 625 (5th Cir.), cert. denied, 434 U.S. 902, 98 S.Ct. 295 (1977)), cert. denied, 469 U.S. 1189, 105 S.Ct. 957 (1985). We do not think the prosecutor's comment can be so construed. Here, we think that the prosecutor simply sought to describe what the evidence established, and what the evidence did not establish. Such comments do not violate the constitutional right of the accused to remain silent.

The prosecutor also made the following

statement:

> Well, ladies and gentlemen, we are the government in this case. Do you really believe that we're bumbling fools? Do you think that we can be fooled by every single solitary one of these witnesses? Did you think that we took them at face value and didn't try to corroborate, support their testimony[?]
>
> . . . .
>
> This is a two-year investigation. And that is in evidence. Do you really think that the witnesses, once again, went out and got all of these records, brought them to us and told us the story and we just believe it and brought it to you.

The Government maintains that these comments were not improper, since "the prosecutor continuously requested the jury directly, and by way of questions posed for the jury to answer, to decide for itself whether the witnesses' testimony was credible." Having examined the comments in their full context, we find them to be within the proper scope of rebuttal. We

also believe that even if the remarks were improper, the error would be harmless.

IV.

Appellants present two issues regarding the jury:

A.

Appellants argue that the court should have given instructions on multiple conspiracies. The United States counters, saying that the refusal to give such instruction was consistent with past precedent, and further, points to the pattern of acquittals and reversals as evidence that the jury considered whether the conduct charged in each count evidenced a separate conspiracy or a continuing single conspiracy. We agree that the instructions were proper.

B.

During the course of the trial, three problems arose with regard to the jury.

First, the court allowed Juror Judy Howells to withdraw from the case, after learning that she had been having an affair with Alternate Juror Bill Anspaugh, that her husband had found out about the affair, and that he was threatening to kill Anspaugh. Second, the court subsequently learned thta Anspaugh had some remote connections to parties charged in the case: a friend of a friend, named Andy Piazzo, knew two individuals, Mike Matiye and "Rocky," who allegedly had some involvement with the defendants. After conducting in camera interrogations of Anspaugh and conversations with the other jurors on the record before the court reporter, the court concluded it would excuse Anspaugh, but postponed such action because it would have left the jury without an alternate. Because of the incapacity of another juror, Anspaugh did, in fact, serve as a juror in

the trial. The third problem arose when Juror Southerland fainted in the jury box, striking her head as she fell. The judge excused Southerland, who was subsequently hospitalized for numerous tests.

Juror problems are committed to the sound discretion of the district court. We can see no basis for finding that the district court abused its discretion with regard to its actions concerning Jurors Howells and Southerland. With regard to the court's treatment of Anspaugh, the appellants' primary objection is that the court conducted its interview of Anspaugh in camera. Previous decisions of this court establish that such interviews do not violate the sixth amendment right of confrontation or the fifth amendment's guarantee of due process. See United States v. Watchmaker, 761 F.2d 1459, 1466 (11th Cir. 1985). In this case, any

possible deprivation was alleviated by the district judge's release of the transcript of his conversation to the parties. Appellants also argue that the court failed to investigate Anspaugh's contacts to a sufficient extent. Such investigation is within the sound discretion of the court. The verdicts in this case also do not show any resulting prejudice to the appellants. We conclude that the trial judge handled the jury problems in an adequate fashion.

V.

Appellants present one issue with regard to post-trial proceedings. Appellant Vaseliades contends that his conviction of importation of marijuana is inconsistent with his acquittal of possession of marijuana with intent to distribute. We disagree: the jury could well have concluded that Vaseliades was involved only in the importation and not

the distribution of the marijuana.

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1. This unpublished opinion is issued contemporaneously with a published opinion in this case. This instant opinion supplements the published opinion and does not repeat discussions contained therein.

2. Two superseding indictments were later handed down on September 24 and November 20, 1984, respectively.

3. The jury also convicted Albert Papolos of the substantive RICO offense, but on September 17, 1985, the trial court entered a post-verdict judgment of acquittal as to Albert Papolos on the substantive RICO count.

4. The search warrant stated as follows:

> Affidavit(s) having been made before me by the below-named affiant that he/she has reason to believe that (on the person of) (on the premises known as) 1301 4th St. N. St. Petersburg, FL more particularly described as a red/brown brick building with a sign on the front of the building which reads: 1301 Law Offices of George N. Meros, Peter N. Meros, Walter E. Smith, Dede Moros-Neofeld Attorneys at Law in the Middle District of Florida there is now being concealed certain property, namely
>
> 1) All records including files, appointment calendars 1978 to the present, correspondence, memoranda of meetings or conversations, time sheets, notes, telex messages, bank records (foreign and domestic), travel

records, checks, receipts, and escrow account records pertaining to the following individuals[:] Byron Wever, Mark Knight, James McLaughlin, David Strongosky, David Capo.

2) All records pertaining to any foreign or domestic bank accounts, or foreign and domestic corporations including accounts and corporations in the Cayman Islands, the Netherlands-Antilles, Switzerland, and Liechtenstein. Said records include correspondence, ledgers, checks, wire transfers, deposit slips, safe deposit box records, stock, resolutions, stock receipts, articles of incorporation, trust agreements.

3) Copies of cashiers checks or bank checks or wire transfers in amounts less than $10,000 and receipts pertaining thereto.

4) Travel records relating to international travel by George Meros from 1977 to the present; said records to include copies of airline tickets, checks, invoices, receipts.

5) All records pertaining to the vessel "Mis Vicki"

6) All records pertaining to a purported sale of a condominium by Byron Wever to George N. Meros in 1979 including any copies of a $20,000. check to Byron Wever, bank records pertaining thereto, copies of public documents regarding such a transaction, written agreements or contracts pertaining thereto and any

files pertaining thereto.

7) All records pertaining to the payment of legal fees for Byron Wever and/or Carol Wever.

5. Swiss procedural law required the Swiss tribunal to consider Meros' and Papolos' appeals even after the district court's order had forced them to formally withdraw their objections.

6. Michael Ferrentino also contends on appeal that he was misjoined. Michael Ferrentino was charged with RICO conspiracy, 18 U.S.C. § 1962(d) (1982), substantive RICO, id. § 1962(c), interstate travel in aid of racketeering, id. §§ 2, 1952, importation of marijuana, id. § 2; 21 U.S.C. § 952(a) (1982), possession of marijuana in excess of 1000 pounds with intent to distribute, id. § 841(a)(1), and conspiracy to so possess. Id. §§ 841(a)(1), (b)(6), 846 (1982). The propriety of his joinder is clear.

7. Vaseliades was indicted on May 25, 1984. The trial in this case did not commence until March 25, 1985.

8. Vaseliades contests the Government's calculation of excusable delay. He appears to have analyzed the various motions made during this period, and asserts that "taking into consideration the times excludable against Appellant to its speedy trial rights that there have elapsed 147 days of non-excludable time from the date of the return of the indictment on May 25, 1984 until the time of trial on March 25, 1985. Under 18 U.S.C. § 3161 defendant is entitled to trial within 70 days and

clearly 147 days of non-excludable time is well beyond reasonability."

9. Meros also argues that Agent Coursey's testimony was admissible under Fed. R. Evid. 804(B)(3) (statement against interest) and 613(b) (inconsistent statement). Rule 803(B)(3) applies only when the declarant is unavailable. Since Michael Ferrentino, the declarant, was available, Meros' argument as to Rule 803(B)(3) is without merit. Rule 613 is procedural in nature, and does not provide an independent basis for admissibility of evidence that is otherwise inadmissible as hearsay.

10. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

**AMENDMENT V-GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or Public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## AMENDMENT VI–JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**§ 1001. Statements or entries generally**

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 749.

**§ 5321. Civil penalties**

(a)(1) A domestic financial institution, and a partner, director, officer or employee of a domestic financial institution, willfully violating this subchapter or a regulation prescribed under this subchapter (except sections 5314 and 5315 of this title or a regulation prescribed under sections 5314 and 5315) is liable to the United States Government for a civil penalty of not more than the greater of the amount (not to exceed $100,000) involved in the transaction (if any) or $25,000. For a violation of section 5318(a)(2) of this title or a regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues at each office, branch, or place of business at which a violation occurs or continues.

**§ 5322. Criminal penalties**

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $250,000, or imprisonment[1] not more than five years, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.

(c) For a violation of section 5318(a)(2) of this title or a regulation

prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

(As amended Pub.L. 98-473, Title II, § 901(b), Oct. 12, 1984, 98 Stat. 2135; Pub.L. 99-570, Title I, §§ 1356(c)(1), 1357(g), Oct. 27, 1986, 100 Stat. 3207-24, 3207-26.)

**§5313. Reports on domestic coins and currency transactions**

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

(b) The Secretary may designate a domestic financial institution as an agent of the United States Government to

receive a report under this section. However, the Secretary may designate a domestic financial institution that is not insured, chartered, examined, or registered as a domestic financial institution only if the institution consents. The Secretary may suspend or revoke a designation for a violation of this subchapter or a regulation under this subchapter (except a violation of section 5315 of this title or a regulation prescribed under section 5315), section 411 of the National Housing Act (12 U.S.C. 1730d), or section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b).

(c)(1) A person (except a domestic financial institution designated under subsection (b) of this section) required to file a report under this section shall file the report-

(A) with the institution

involved in the transaction if the institution was designated;

(B) in the way the Secretary prescribes when the institution was not designated; or

(C) with the Secretary.

(2) The Secretary shall prescribe-

(A) the filing procedure for a domestic financial institution designated under subsection (b) of this section; and

(B) the way the institution shall submit reports filed with it.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 996.)

## § 5314. Records and reports on foreign financial agency transactions

(a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship.

(2) the legal capacity in which a participant is acting.

(3) the identity of real parties in interest.

(4) a description of the transaction.

(b) The Secretary may prescribe-

(1) a reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section;

(2) a foreign country to which a requirement or a regulation under this section applies if the Secretary decides applying the requirement or regulation to all foreign countries is unnecessary or undesirable;

(3) the magnitude of transactions subject to a requirement or a regulation under this section;

(4) the kind of transaction subject to or exempt from a requirement

or a regulation under this section; and

(5) other matters the Secretary considers necessary to carry out this section or a regulation under this section.

(c) A person shall be required to disclose a record required to be kept under this section or under a regulation under this section only as required by law.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 997.)

**§ 5315. Reports on foreign currency transactions**

(a) Congress finds that-

(1) moving mobile capital can have a significant impact on the proper functioning of the international monetary system;

(2) it is important to have the most feasible current and complete information on the kind and source of capital flows, including transactions by large United States businesses and their foreign affiliates; and

(3) additional authority should be provided to collect information on capital flows under section 5(b) of the Trading With the Enemy Act (50 App. U.S.C. 5(b)) and section 8 of the Bretton Woods Agreement Act (22 U.S.C. 286f).

(b) In this section, "United States person" and "foreign person controlled by a United States person" have the same meanings given those terms in section

7(f)(2)(A) and (C), respectively, of the Securities and Exchange Act of 1934 (15 U.S.C. 78g(f)(2)(A), (C)).

(c) The Secretary of the Treasury shall prescribe regulations consistent with subsection (a) of this section requiring reports on foreign currency transactions conducted by a United States person or a foreign person controlled by a United States person. The regulations shall require that a report contain information and be submitted at the time and in the way, with reasonable exceptions and classifications, necessary to carry out this section.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 997.)

**§5316. Reports on exporting and importing monetary instruments**

(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly-

(1) transports or has transported monetary instruments of more than $5,000 at one time-

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through a place outside the United States; or

(2) receives monetary instruments of more than $5,000 at one time transported into the United States from or through a place outside the United States.

(b) A report under this section shall be filed at the time and place the Secretary

of the Treasury prescribes. The report shall contain the following information to the extent the Secretary prescribes:

(1) the legal capacity in which the person filing the report is acting.

(2) the origin, destination, and route of the monetary instruments.

(3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting, them, the identity of the person who is to receive them, or both.

(4) the amount and kind of monetary instruments transported.

(5) additional information.

(c) This section or a regulation under this section does not apply to a common carrier of passengers when a passenger

possesses a monetary instrument, or to a common carrier of goods if the shipper does not declare the instrument.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 998).

**§ 5317. Search and forfeiture of monetary instruments**

(a) The Secretary of the Treasury may apply to a court of competent jurisdiction for a search warrant when the Secretary reasonably believes a monetary instrument is being transported and a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement. The Secretary shall include a statement of information in support of the warrant. On a showing of probable cause, the court may issue a search warrant for a designated person or a designated or described place or physical object. This subsection does not affect the authority of the Secretary under another law.

(b) A monetary instrument being transported may be seized and forfeited to the United States Government when a report on the instrument under section

5316 of this title has not been filed or contains a material omission or misstatement. A monetary instrument transported by mail or a common carrier, messenger, or bailee is being transported under this subsection from the time the instrument is delivered to the United States Postal Service, common carrier, messenger, or bailee through the time it is delivered to the addressee, intended recipient, or agent of the addressee or intended recipient without being transported further in, or taken out of, the United States.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 998.)

**§ 5318. Compliance and exemptions**

The secretary of the Treasury may (except under section 5315 of this title and regulations prescribed under section 5315)-

(1) delegate duties and powers under this subchapter to an appropriate supervising agency;

(2) require a class of domestic financial institutions to maintain appropriate procedures to ensure compliance with this subchapter and regulations prescribed under this subchapter; and

(3) prescribe an appropriate exemption from a requirement under this subchapter and regulations prescribed under this subchapter. The Secretary may revoke an exemption by actually or constructively notifying the parties affected. A revocation is effective during judicial review.

**§ 5319. Availability of reports**

The Secretary of the Treasury shall make information in a report filed under section 5313, 5314, or 5316 of this title available to an agency on request of the head of the agency. The report shall be available for a purpose consistent with those sections or a regulation prescribed under those sections. However, a report and records of reports are exempt from disclosure under section 552 of title 5.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 999.)

§5321. Civil penalties

(a)(1) A domestic financial institution, and a partner, director, officer, or employee of a domestic financial institution, willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) is liable to the United States Government for a civil penalty of not more than $1,000. For a violation of section 5318(2) of this title or a regulation prescribed under section 5318(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

(2) The Secretary of the Treasury may impose an additional civil penalty on a person not filing a report, or filing a report containing a material omission or

misstatement, under section 5316 of this title or a regulation prescribed under section 5316. A civil penalty under this paragraph may not be more than the amount of the monetary instrument for which the report was required. A civil penalty under this paragraph is reduced by an amount forfeited under section 5317(b) of this title.

(3) A person not filing a report under a regulation prescribed under section 5315 of this title or not complying with an injunction under section 5320 of this title enjoining a violation of, or enforcing compliance with, section 5315 or a regulation prescribed under section 5315, is liable to the Government for a civil penalty of not more than $10,000.

(b) The Secretary may bring a civil action to recover a civil penalty under subsection (a)(1) or (2) of this

section that has not been paid.

(c) The Secretary may remit any part of a forfeiture under section 5317(b) of this title or civil penalty under subsection (a)(2) of this section.

(Pub.L 97-258, Sept. 13, 1982, 96 Stat. 999.)

**§ 5322. Criminal penalties**

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than . . . for not more than one year, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

(c) For a violation of section 5318(2) of this title or a regulation

prescribed under section 5318(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 1000.)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 85-3774

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE N. MEROS,
MICHAEL FERRENTINO,
LINDA FERRENTINO,
MICHAEL RUBENSTEIN,
JOHN FRAZIER, a/k/a J.J.,
ACHILLES NICK VASELIADES,
ALBERT H. PAPOLOS,

Defendants-Appellants.

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Appeal from the United States District Court for the Middle District of Florida

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ON PETITIONS FOR REHEARING AND
SUGGESTIONS OF REHEARING EN BANC

Before TJOFLAT, VANCE and COX, Circuit Judges.

PER CURIAM:

George N. Meros, Michael Ferrentino, Linda Ferrentino, John Frazier, Achilles Nick Vaseliades, and Albert Papolos now come before us, petitioning us to reconsider certain factual statements and legal conclusions in our opinions in this case. See United States v. Meros, ___ F.2d ___ (11th Cir. 1989); United States v. Meros, No. 85-3774 (11th Cir. Feb. 13, 1989) (unpublished supplement to published opinion. Except as noted below, we conclude that petitioners' challenges are without merit.

Appellant Meros brings to the court's attention the following inaccurate statement in the panel's unpublished opinion in this case. In that opinion we stated:

> Meros also argues that Agent Coursey's testimony was admissible under Fed. R. Evid. 804(b)(3) (statement against interest) and

> 613(b) (inconsistent statement). Rule 804(b)(3) applies only when the declarant is unavailable. Since Michael Ferrentino, the declarant, was available, Meros' argument as to Rule 804(b)(3) is without merit. Rule 613 is procedural in nature, and does not provide an independent basis for admissibility of evidence that is otherwise inadmissible as hearsay.

United States v. Meros, unpublished slip op. at 37 n.9 (emphasis added). This note should read as follows:

> Meros also argues that Agent Coursey's testimony was admissible under Fed. R. Evid. 804(b)(3) (statement against interest) and 613(b) (inconsistent statement). Rule 804(b)(3) applies only when the declarant is unavailable. Since Byron Wever, the declarant, was available, Meros' argument as to Rule 804(b)(3) is without merit. Rule 613 is procedural in nature, and does not provide an independent basis for admissibility of evidence that is otherwise inadmissible as hearsay.

(Emphasis added). This momentary "confusing of the players" did not affect our substantive understanding of appellant's claim; our correction, therefore, does not alter our conclusion

regarding the admissibility of Agent Coursey's testimony under Fed. R. Evid. 804(b)(3).

Byron Wever was a key Government witness at trial; he was therefore clearly available, and appellant Meros, in fact, conducted an extensive cross-examination of Wever. On rehearing, Meros claims that although Wever was available for cross-examination, Wever was <u>legally</u> unavailable because he claimed a lack of memory with regard his conversations with Agent Coursey. Federal Rule of Evidence 804(a)(3) provides that "'[u]navailability as a witness' includes situations in which the declarant . . . testifies to a lack of memory of the subject matter of the declarant's statement." Appellant directs our attention to a number of statements in which, on cross-examination, Wever declared he had no recollection of certain

statements that he allegedly made to Agent Coursey. Even from the excerpted statements cited in appellant's brief, it is clear that these statements do not indicate that Wever could not, in fact, remember the conversations; rather the statements show that Wever unequivocally denied ever making the alleged statements. Such denials, though couched in terms of a lack of memory, do not render Wever "unavailable" for purposes of Fed. R. Evid. 804(b)(3). See generally E. Cleary, McCormick's Handbook of the Law of Evidence § 253(5) (2d ed. 1972).

Appellants' petitions for rehearing are DENIED.